Filed 3/28/19 P. v. Novinger CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. STEPHEN ALAN NOVINGER, Defendant and Appellant.	C084518 (Super. Ct. Nos. STK-CR-FE-2015-0006113, LOD-CR-FE-2016-0015677)

Defendant Stephen Alan Novinger appeals his convictions for robbery, making criminal threats, assault with a deadly weapon, possession of ammunition by a felon, being a felon in possession of a firearm, and carrying a concealed firearm in a vehicle. Defendant contends the trial court erred in failing to give a sua sponte unanimity instruction, failing to give a self-defense instruction, and failing to stay the sentence on possession of ammunition by a felon.

After briefing was completed in this case, the Court of Appeal, Second Appellate District, Division Two, issued its decision in *People v. Aledamat* (2018) 20 Cal.App.5th 1149, review granted July 5, 2018, S248105 (*Aledamat*), holding the trial court prejudicially erred in instructing the jury with CALCRIM No. 875, that a box cutter could be an inherently deadly weapon. We granted defendant's request for supplemental briefing based on this new authority.

We will stay the sentence on the possession of ammunition by a felon. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On November 22, 2016, Crystal Gonzalez was working as a cashier at a Chevron gas station convenience store on Kettleman Lane. Muhammad Khan was also a clerk for Chevron. Although he worked at a different station, he was at the Kettleman Lane store that morning, bringing them coffee filters.

Defendant came into the Kettleman store, acting shaky and erratic. He asked if they had portable cell phone chargers. Gonzalez informed him they did not. Defendant looked at a bin of cell phone chargers, and Gonzalez saw him take one. He then went over to a display of chargers by a cash register, ripped one off the display, and returned to Gonzalez's register. He asked if it was a portable charger, she said it was not, and he handed it back to her. Khan came into the Kettleman store while defendant was looking at the chargers, and was behind the counter.

As defendant went to leave the store, Gonzalez asked if he was going to pay for the charger he took. Defendant denied taking the charger. He was angry, and he started yelling and cussing. Gonzalez told Khan defendant had stolen a charger. Defendant walked out of the store and Khan followed him to see what kind of car he was driving and to get a license plate number. Defendant saw Khan and started saying things, then he

threw a traffic cone at Khan. When Gonzalez saw defendant throw the cone at Khan, she called the police.

Khan was hit with the cone, Kahn "told him something" and then defendant came toward him, cussing at him, wielding a knife. Defendant said, "I'm going to stab you" and repeatedly said, "I'm going to get you." Khan ran and hid. Defendant continued searching for Khan, yelling, screaming, and cussing, "Come here, you motherfucker, where you at?" Khan called 911. Khan was frightened and believed defendant would stab him.

Officer Richard Dunfee arrived within a few minutes. He detained defendant and in a pat search, found a folding knife in his pocket. Dunfee also searched defendant's car. Inside the car, Dunfee found pieces to two shotguns, and a third shotgun barrel. The pieces could be assembled into a working shotgun. The shotgun pieces were in plain sight on the floorboard, and could be seen from outside the car. The extra shotgun barrel had two rounds of ammunition in it. Dunfee also found a handgun in the front console of the car. The handgun had a live round in the chamber and eight rounds in the magazine. Dunfee also found a knife and phone charger in the car.

Defendant testified he did not intend to steal the charger. He put it in his pocket while he went to get a soda. The clerk accused him of trying to steal it, an accusation he denied, and he gave it back to her. When he was walking to his car, Khan came out and said, "I'm going to stab you, motherfucker." Defendant turned around and said, "Okay. You got a problem?" They argued. Defendant felt threatened by Khan's statement. He denied threatening Khan. He also denied knowing the guns were in his car.

A December 15, 2016 information charged defendant with second degree robbery (Pen. Code, § 211—count 1),[1] criminal threats (§ 422, subd. (a)—count 2), assault with a

[1] Undesignated statutory references are to the Penal Code.

deadly weapon (§ 245, subd. (a)(1)—count 3), possession of ammunition by a felon (§ 30305, subd. (a)(1)—count 4), felon in possession of a firearm (§ 29800, subd. (a)(1)—count 5), and carrying a concealed firearm in a vehicle (§ 25400, subd. (a)(1)—count 6). The People also alleged defendant violated probation in a prior case by committing these offenses.

A jury found defendant guilty on all counts and the trial court found defendant had violated probation in his earlier case. The trial court sentenced him to an aggregate term of four years four months, as follows: count 1, the middle term of three years in state prison; count 2, the middle term of two years in prison, concurrent to count 1; count 3, the middle term of three years in prison stayed pursuant to section 654; count 4, the middle term of two years in prison, concurrent to count 1; count 5, one-third the middle term of eight months in prison, consecutive to count 1; count 6, time served; and, eight months consecutive on the prior case.

DISCUSSION

1.0 Unanimity Instruction

Defendant contends his robbery conviction must be reversed as the trial court erred in failing to give a sua sponte unanimity instruction. He contends that in closing argument the prosecution argued that both Khan and Gonzalez were the victims of the robbery, and there was only one robbery charge; therefore, the trial court was required to give a unanimity instruction as to whether Khan or Gonzalez was the victim of the robbery.

A criminal defendant is constitutionally "entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged." (*People v. Jones* (1990) 51 Cal.3d 294, 305.) Accordingly, when a defendant is charged with a single criminal act but the evidence reveals more than one such act, "either the prosecution must elect

among the crimes or the court must require the jury to agree on the same criminal act." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "This is the so-called 'either/or' rule," "under which the trial court may meet its sua sponte obligations with *either* an election *or* an instruction . . . ." (*People v. Salvato* (1991) 234 Cal.App.3d 872, 880, 878.) Thus, if the prosecutor elects the specific act relied upon to prove the charge, the court has no duty to instruct the jury that it must agree on the same criminal act. (*Id*. at p. 880.) To be effective, the prosecution's election must be clearly communicated to the jury. (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1455.) The prosecution can do so by "tying each specific count to specific criminal acts elicited from the victims' testimony"—typically in opening or closing argument. (*People v. Diaz* (1987) 195 Cal.App.3d 1375, 1382.)

Here, in closing argument, the prosecution argued the phone charger was taken from the "immediate presence" of both Gonzalez and Khan. The prosecutor also stated, "Force or fear was used when taking the property. Now, in this situation—well, the law says I have to prove beyond a reasonable doubt that he used force or fear. In this case, he did both, as we know. He yelled and made threatening gestures toward [Gonzales]. He threw a cone at [Khan] while he was trying to get his license plate number. He pulled a knife on [Khan]. Chased him into the car lot, and then verbally threatened him. Again, using the weapons that he had on him, the cone and the knife." Defendant claims based on this argument, there were two possible victims of the robbery and the jury should have been given a unanimity instruction.

Defendant's claim disregards the rest of the record, which vitiated any need for a unanimity instruction. In addition to the arguments defendant recites above, the prosecutor also made clear in argument, "This was a robbery. A petty theft instruction is going to say he took something, he left the store, and that's it. That went out the window when the violence started. That's when it became a robbery, when he threw the cone, when he threatened [Khan], when he pulled out the knife. That's when the robbery

happened. That's the force and fear. Okay?" In rebuttal closing argument, the prosecution restated, "It's a robbery. It is very clearly a robbery. There is no doubt to that at all. This is not a petty theft. Again, that went out the window the minute he threw the cone and was yelling and screaming and pulling knives and threatening. The petty theft went out the window at that point." The conduct described here elevating the offense from a petty theft to a robbery only occurred as to Khan, and the prosecutor made that clear.

Despite these arguments, apparently, trial counsel interpreted closing argument in the same way as appellate counsel does. Thus, after closing argument, she requested the verdict forms be amended to explicitly name Khan as the victim of the robbery "so that there's no confusion to the jurors." The trial court agreed "to be safe." Accordingly, the prosecution prepared new verdict forms to give to the jury, explicitly naming Khan as the victim of the robbery. In addition to the jury verdict forms, the information named Khan as the victim of the robbery. The information was read to the jury. By naming Khan as the victim in both the information and the verdict forms, the People expressly elected to proceed on the theory that he was the victim to ensure a unanimous verdict as constitutionally required. That election was directly communicated to the jury. (See *People v. Mayer* (2003) 108 Cal.App.4th 403, 418-419; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539.)

Furthermore, in this case, even if we assume a unanimity instruction was required, the error is harmless even under the *Chapman* standard of beyond a reasonable doubt. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 576-577 [noting split of authority as to whether *Chapman* or *Watson* standard applies to erroneous omission of unanimity instruction (*Hernandez*, at p. 568, fns. 6 & 7)].)[2] Here, the jury returned the verdict

[2] *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705]; *People v. Watson* (1956) 46 Cal.2d 818.

forms, naming Khan as the victim of the robbery. The clerk read the verdict aloud in open court, naming Khan as the victim of the robbery, and each juror confirmed this was his or her verdict. The purpose of a unanimity instruction is to ensure the jury agrees on a particular crime having been committed. In this case, it would have been unacceptable for some jurors to believe defendant committed a robbery of Gonzalez and others to believe defendant was guilty of a robbery of Khan. (*People v. Russo*, *supra*, 25 Cal.4th at p. 1134.) We can think of no more compelling demonstration that there was no disagreement as to who was the victim of the robbery than the jury's unanimously finding and confirming its verdict in open court, explicitly stating that Khan was the victim of the robbery. Logically, when a jury verdict form sets forth a particular factual theory, the jury must be presumed to have limited its finding of guilt to that particular factual theory. Accordingly, even if there was error, it was harmless beyond a reasonable doubt.

2.0 Self-defense Instruction

Defendant contends the trial court erred in failing to instruct the jury on self-defense. He contends his testimony that Khan came out of the store and yelled he was going to stab defendant, which made him feel threatened, justified an instruction on self-defense.[3]

2.1 *Background*

In conference on instructions relating to assault with a deadly weapon, which includes a reference to defendant's acting in self-defense, the court asked defense counsel if she was "requesting self-defense." She stated, "Not at this point." Accordingly, the trial court deleted that provision from the instruction. Later, in discussions prior to closing argument, the prosecution asked, "On the [section] 245 [assault with a deadly

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[3] Defendant does not indicate to which offense he would have offered a self-defense theory. The only offense to which such a theory would apply is the assault with a deadly weapon charge. Our analysis proceeds accordingly.

weapon] you're not going [to] mention anything about self-defense, even though that's one of the elements, not done in self-defense?" The trial court answered, "They only get that if they're asking for self-defense."

Defense counsel made a motion for acquittal (§ 1118) on the robbery charge. The trial court denied the motion, finding there was enough evidence for the jury to determine the robbery count. The court then continued, "I wanted to put on the record—I asked if the defense was going to be requesting a self-defense, and they said they were not. And even were they to request the self-defense, I don't think that there would be substantial evidence to support it. [¶] So it was not requested, but even if it was, I want the record to be clear that I don't think that there's enough to substantiate giving the self-defense instruction in this case."[4]

2.2 *Analysis*

It is well settled that "a defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence [citation]—evidence sufficient for a reasonable jury to find in favor of defendant [citation]—unless the defense is inconsistent with the defendant's theory of the case [citation]. In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt . . . .' " (*People v. Salas* (2006) 37 Cal.4th 967, 982.) But if the evidence of the purported defense is minimal or insubstantial there is no duty to instruct. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145.) The doctrine of invited error will operate to preclude a defendant from gaining reversal on appeal because of such an error

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[4] Contrary to defendant's claim, this was not a "ruling" by the trial court "refusing" to give the self-defense instruction. Defense counsel never made a request for the self-defense instruction.

made by the trial court at the defendant's behest. (See *People v. Sedeno* (1974) 10 Cal.3d 703, 716; *People v. Wickersham* (1982) 32 Cal.3d 307, 330; *People v. Cooper* (1991) 53 Cal.3d 771, 827.) The doctrine of invited error will apply, if defense counsel suggests, or accedes, to the instructional error, only if there is a deliberate tactical choice between having the instruction and not having it, even if such a choice was based on a misunderstanding of the law. (See *People v. Graham* (1969) 71 Cal.2d 303, 319; *People v. Cooper*, *supra*, 53 Cal.3d at p. 831; *People v. Duncan* (1991) 53 Cal.3d 955, 969-970.) As above, defense counsel explicitly informed the court she was not requesting a self-defense instruction.

Even in the absence of defense counsel's "inviting error," "[a]s to defenses, such as self-defense, the court must instruct sua sponte only if there is substantial evidence of the defense and the defense is not 'inconsistent with defendant's theory of the case.' (*People v. Breverman* [(1998)] 19 Cal.4th 142[, 157], quoting from *Sedeno*.) . . . [I]n the event that there is substantial evidence of a defense inconsistent with the defense advanced by the defendant, the court should ascertain whether the defendant wants instructions on the alternate theory." (*People v. Elize* (1999) 71 Cal.App.4th 605, 615.)

In this case, there was no error in failing to give the self-defense instruction, because it was inconsistent with the defense theory. The defense theory on the assault with a deadly weapon charge was that defendant was too far away from Khan for it to constitute an assault, i.e., "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Defense counsel argued, "I would like to discuss the [section] 245. In this case, the distance matters on whether or not it's a [violation of section] 245. Mr. Khan says he saw a knife come out of a pocket, but he sees this knife 20 feet away. He described—I got to be very clear. [Defendant] had walked out. There's a handicapped space. There was a truck parked here, and there was

a car, which he says was [defendant's], and [defendant] was there. He was on the opposite side at least 20 feet away when he felt a cone either go by him or hit him.

"And he turned around at that point. At least 20 feet away is when he alleges he saw a knife. And he kept going like this at his side. The law requires for both a [section] 245 and a [section] 240 that any actions that [defendant] would have taken probably would result—if I'm standing 20 feet away from this person and I'm holding it here, I'm not probably going to use it. That's not assault with a deadly weapon.

"You know what it is? It is actually exhibiting a weapon in a rude or angry manner. That's what he did." Later she again argued the distance between Khan and defendant prevented it from being an assault. "The government charged him with assault with a deadly weapon, and that's not what this case is. Distance matters. I cannot stab somebody 20 feet away. I am not assaulting them with a deadly weapon. I'm being rude. I might be exhibiting it in a rude, angry manner. It's not what he's charged with. And it matters. [¶] Your job, you have to methodically go through. There is no—when it says that this act, pulling it out and standing 20 feet away, would directly and probably result—no. If I was two feet away and I pulled it out in a rude and angry manner, that's a difference. I could directly and probably have injured somebody. I can apply force when someone's here, not 20 feet away." And she concluded her argument with, "It's to the [section] 245, assault with a deadly weapon. There's no assault. He has to be close enough to actually probably be able to carry that out. He wasn't able to."

A claim of self-defense requires the defendant to reasonably believe that he was in imminent danger of suffering bodily injury and the immediate use of force was necessary to defend against that danger. (CALCRIM No. 3470.) If defendant was too far away from Khan to have a present ability to commit a violent injury, logic dictates Khan was too far away from defendant to have made him reasonably fear he was in imminent danger of suffering bodily injury. Thus, the theories were inconsistent. Because self-

defense was inconsistent with the defense theory of the case, there was no error in failing to instruct on self-defense.

3.0 Section 654

Defendant contends, and the People concede, that the trial court erred in failing to stay the sentence on unlawful possession of ammunition in count 4, because that ammunition was found in the firearms he was convicted of unlawfully possessing in counts 5 and 6. "To allow multiple punishment for possessing ammunition in a firearm would, in our judgment, parse the objectives too finely. While there may be instances when multiple punishment is lawful for possession of a firearm and ammunition, the instant case is not one of them. Where, as here, all of the ammunition is loaded into the firearm, an 'indivisible course of conduct' is present and section 654 precludes multiple punishment." (*People v. Lopez* (2004) 119 Cal.App.4th 132, 138.) Accordingly, we will order the sentence for count 4 stayed under section 654.

4.0 CALCRIM No. 875

Defendant contends the trial court erred in instructing the jury with CALCRIM No. 875 that a folding knife could be an inherently deadly weapon. He argues this was an invalid legal theory and, relying on *Aledamat*, *supra*, 20 Cal.App.5th 1149, review granted, contends the error was prejudicial as there is no basis for concluding the jury relied on the alternative, correct legal theory defining a deadly weapon.

4.1 *Background*

The trial court instructed the jury with CALCRIM No. 875 delineating the elements of assault with a deadly weapon other than a firearm. The instruction defines a deadly weapon other than a firearm as: "any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."

In closing argument, the People did not mention the concept of an inherently deadly weapon. The People argued, "defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person. [¶] Defendant acted willfully. [¶] And when he acted, he was aware of facts that would lead a reasonable person to realize his act, by its nature, would directly and probably result in the application of force to someone. When he acted, he had the present ability to apply that force. [¶] Element number one, defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force on [Khan]. [¶] Defendant pulled the knife on him, he chased him with the knife, threatened him with the knife. His actions suggested his intent to harm [Khan], and [Khan] took it that way." "Defendant pulled the knife on [Khan] and chased him. He acted willfully. And when he acted, he knew his actions conveyed to [Khan] the threat of being stabbed. He had the ability to stab him. He's guilty of count 3, assault with a deadly weapon."

Nor did defendant argue the folding knife was not an inherently deadly weapon. Counsel argued, as noted above, "I would like to discuss [section] 245. In this case, the distance matters on whether or not it's a [section] 245. Mr. Khan says he saw a knife come out of a pocket, but he sees this knife 20 feet away. He described—I got to be very clear. [Defendant] had walked out. There's a handicapped space. There was a truck parked here, and there was a car, which he says was [defendant's], and [defendant] was there. He was on the opposite side at least 20 feet away when he felt a cone either go by him or hit him. [¶] And he turned around at that point. At least 20 feet away is when he alleges he saw a knife. And he kept going like this at his side. The law requires for both a [section] 245 and a [section] 240 that any actions that [defendant] would have taken probably would result—if I'm standing 20 feet away from this person and I'm holding it here, I'm not probably going to use it. That's not assault with a deadly weapon." "It's to

the [section] 245, assault with a deadly weapon. There's no assault. He has to be close enough to actually probably be able to carry that out. He wasn't able to."

In rebuttal, the People responded to defendant's argument about the distance, but still did not argue the knife was an inherently deadly weapon. "With regard to the assault with a deadly weapon. Mr. Khan told you that the defendant was 20 feet away when he threw the cone, and by the time he turned around, the defendant was running at him with the knife. 'Charging at him,' I believe [were] the words he used. Coming at him with a knife. [¶] If Mr. Khan is standing still and [defendant's] running, that gap gets filled really quick; 20 feet is nothing. Of course he had the present ability to stab him with the knife. [¶] Of course distance matters, but it's what Mr. Khan felt was going to happen to him. And of course he felt like he was going to be stabbed. He ran for his life. He ran, he hid, he zigzagged. He did everything he could to get away from [defendant]. Of course he was assaulted with a deadly weapon."

4.2 *Analysis*

Initially, the People contend the claim is forfeited by defendant's failure to object in the trial court. "The trial court must instruct even without request on the general principles of law relevant to and governing the case. [Citation.] That obligation includes instructions on all of the elements of a charged offense." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311, abrogated on another ground in *People v. Merritt* (2017) 2 Cal.5th 819, 831 (*Merritt*).) The claim here relates to an element of the offense—the definition of a deadly weapon. Accordingly, it is not forfeited. (§ 1259; *People v. Gerber* (2011) 196 Cal.App.4th 368, 390.)

The standard version of CALCRIM No. 875, as given, suggests to the jury that a folding knife is an inherently deadly weapon. This was error because, as a matter of law, it is not. (*People v. McCoy* (1944) 25 Cal.2d 177, 188.) The parties do not dispute that the inclusion of language regarding an "inherently deadly weapon" in CALCRIM

No. 875 was instructional error. They disagree, however, on whether the error was prejudicial. Relying on *Aledamat*, defendant contends the instructional error represents a legally invalid theory and the conviction must be reversed under a heightened *Chapman* standard; that is, that the record must affirmatively show the jury actually relied on the alternative, correct, definition of a deadly weapon. (*Aledamat, supra,* 20 Cal.App.5th at pp. 1153-1154, review granted.) The People argue the instructional error represents a factually invalid theory, which should be affirmed, or alternatively if it is a legally invalid theory, the conviction should be found harmless under the *Chapman* standard.

An invalid legal theory involves an incorrect statement of law. An invalid factual theory involves a legally correct statement of law, but one which does not apply to the case as it is not supported by the facts of the evidence. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1125 (*Guiton*), citing *Griffin v. United States* (1991) 502 U.S. 46, 59 [116 L.Ed.2d 371].) "Inherently deadly weapon" is a term of art describing objects that are deadly in "the ordinary use for which they are designed"; that is, weapons that have no practical nondeadly purpose. (*People v. Perez* (2018) 4 Cal.5th 1055, 1065.) The jurors were not instructed with this definition. Based on the common understanding and usage of the phrase "deadly weapon," they could have understood the phrase to include a folding knife, which can be used for cutting and stabbing. Because of the variance between common understanding and the legal definition of "deadly weapon," the error here was legal, rather than factual. As in *Aledamat,* "[t]here was no failure of proof—that is, a failure to show through evidence that the [folding knife] is an 'inherently dangerous' weapon. Instead, [a folding knife] cannot be an inherently deadly weapon 'as a matter of law.' [Citation.] This is functionally indistinguishable from the situation in which a jury is instructed that a particular felony can be a predicate for felony murder when, as a matter of law, it cannot be." (*Aledamat, supra,* 20 Cal.App.5th at p. 1154, review

granted.) The instructional error presented an invalid legal theory to the jury, not an invalid factual theory. We agree with *Aledamat* on this point. (*Ibid.*)

We disagree, however, with *Aledamat* on its analysis of the correct standard of prejudice to be applied to this error. *Aledamat* applied a "heightened" version of the *Chapman* standard, stating that when a jury has been presented with "two theories supporting a conviction—one *legally* valid and one *legally* invalid—the conviction must be reversed 'absent a basis in the record to find that the verdict was actually based on valid ground.' ([*Guiton, supra,*] 4 Cal.4th [at pp.] 1122, 1129.) That basis exists only when the jury has '*actually*' relied upon the valid theory ([*People v.*] *Aguilar* [(1997)] 16 Cal.4th [1023], 1034, italics added; see *People v. Swain* (1996) 12 Cal.4th 593, 607); absent such proof, the conviction must be overturned—even if the evidence supporting the valid theory was overwhelming (*People v. Sanchez* (2001) 86 Cal.App.4th 970, 981-982.)" (*Aledamat, supra,* 20 Cal.App.5th at p. 1153, review granted.) *Aledamat* went on to acknowledge that the standard of prejudice it was utilizing was "arguably in tension with more recent cases, such as *People v. Merritt* (2017) 2 Cal.5th 819, providing that the failure to instruct on the elements of a crime does not require reversal if those omitted elements are 'uncontested' and supported by ' "overwhelming evidence." ' (*Id.* at pp. 821-822, 830-832; see *Neder v. United States* (1999) 527 U.S. 1, 17-18, [144 L.Ed.2d 35].)" (*Aledamat, supra,* at p. 1154, review granted.) But, the *Aledamat* court claimed the California Supreme Court's decision in *Guiton* was on point and mandated this result. *Aledamat* left it to our Supreme Court to revisit or reconsider this case law. (*Ibid.*)

Guiton determined the standard of review in the case of the jury being instructed with a *factually* inadequate theory. It explicitly did not determine the standard of prejudice where the jury was instructed with a *legally* inadequate theory. "Since we ultimately conclude that this case is governed by *Griffin, supra,* 502 U.S. 46 [factually inadequate theory], we need not decide the exact standard of review of cases governed by

[*People v.*] *Green* [(1980)] 27 Cal.3d 1 [legally inadequate theory]." (*Guiton, supra,* 4 Cal.4th at pp. 1130-1131.) *Guiton* stated that although the general rule was to reverse such a conviction because the appellate court could not determine which theory served as the basis for the verdict, there were various ways in which to determine from other portions of the verdict that the jury necessarily found the defendant guilty under the proper theory. (*Guiton, supra,* 4 Cal.4th at p. 1131.) And, *Guiton* went on to acknowledge "[t]here may be additional ways by which a court can determine that error in the *Green* situation is harmless. We leave the question to future cases." (*Ibid.*; see *People v. Chun* (2009) 45 Cal.45th 1172, 1203.)

Since *Guiton,* some of those "future cases" have been decided, and they indicate that the standard of prejudice to be applied in this case is the *Chapman* standard, not a version which requires affirmative proof of the jury's reliance on a legally valid theory. Since *Guiton* and *Green* the California Supreme Court has stated, "An instruction on an invalid theory may be found harmless when 'other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary' under a legally valid theory. (*People v. Chun*[, *supra,*] 45 Cal.4th [at p.] 1205.)" (*In re Martinez* (2017) 3 Cal.5th 1216, 1226.) In a related context—the omission of an element of the offense in the jury instructions—the Supreme Court explained, "[A] demonstration of harmless error does not require proof that a particular jury '*actually* rested its verdict on the proper ground [citation], but rather on proof beyond a reasonable doubt that *a rational jury* would have found the defendant guilty absent the error [citation]." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 666.) In making this determination, we may review whether other aspects of the verdict leave no reasonable doubt that the jury made the findings necessary for the valid theory (*People v. Chun, supra,* 45 Cal.4th at p. 1205); evaluate the evidence to determine whether the element was uncontested and supported by overwhelming

evidence (*Merritt, supra*, 2 Cal.5th at p. 832); and consider the prosecutor's closing argument (*In re Martinez, supra*, 3 Cal.5th at pp. 1226-1227).

This standard is consistent with the traditional *Chapman* harmless error test applied to cases in which the error amounts to a misinstruction on the elements of an offense, and we believe it is the correct standard in this case. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 320.) That test is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " (*People v. Harris* (1994) 9 Cal.4th 407, 424.) " 'To say that an error did not contribute to the verdict' . . . 'is . . . to find that error unimportant in relation to everything else the jury considered *on the issue in question*, as revealed in the record.' " (*People v. Harris, supra*, 9 Cal.4th at p. 430, quoting *Yates v. Evatt* (1991) 500 U.S. 391, 403 [114 L.Ed.2d 432; see *Merritt, supra*, 2 Cal.5th at pp. 827-828 [an instruction omitting elements of the offense may be harmless where omitted elements were undisputed, the defense was able to contest the omitted elements, and overwhelming evidence supports the omitted element].)

Defendant did not dispute that a folding knife can constitute a deadly weapon if used in such a way that it is capable of causing and is likely to cause death or great bodily injury. The evidence showed defendant used the knife in such a manner as he threatened to stab Khan with the knife and repeatedly said he was going "to get" Khan. When Khan ran and hid, defendant continued searching for him, wielding the knife, and angrily pursuing Khan. Khan was frightened and thought defendant was going to stab him. Defendant did not contest that this use was capable of causing great bodily injury or death. Rather, defendant argued the act of pulling the knife out and chasing Khan was not an act that "by its nature would directly and probably result in the application of force to a person" (CALCRIM No. 875), as he was 20 feet away from Khan. Nor did the People argue that the knife was an inherently deadly weapon. The People also focused

on the nature of defendant's act, chasing and threatening Khan with the knife, and whether that act would directly and probably result in the application of force to a person; rather than whether the weapon was inherently dangerous. Given the weight of the evidence and testimony focusing on how defendant actually used the knife, the arguments of both counsel, and the fact the People did not even mention the invalid theory (*Guiton*, *supra*, 4 Cal.4th at p. 1130), any error in not omitting the language concerning "inherently deadly or dangerous" weapons when defining "deadly weapon" was harmless beyond a reasonable doubt. We are persuaded beyond a reasonable doubt the error in CALCRIM No. 875 was unimportant in relation to everything else the jury considered. (*People v. Brown* (2012) 210 Cal.App.4th 1, 13-14.)

DISPOSITION

The sentence for count 4, possession of ammunition by a felon, is stayed under section 654. The trial court is directed to prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BUTZ, Acting P. J.

We concur:

HOCH, J.

RENNER, J.